In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1429

NOAH GRIMES AND ALICE THOMAS PEARSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 2–4) is reported at 391 F. 2d 709.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1968. A petition for rehearing was denied on April 12, 1968. On May 13, 1968, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

809-022—68

QUESTIONS PRESENTED

1. Whether the seizure of liquor stored in a ditch near a road accessible to the public violated Fourth Amendment rights.

2. Whether the practice of obtaining names of prospective jurors from voter registration lists, with information as to relevant qualifications obtained by a questionnaire and by further questioning by the trial judge, complies with 28 U.S.C. 1861.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioners were convicted of unlawful possession of untaxed whiskey (26 U.S.C. 5205(a)(2) and 5604(a)). On April 28, 1967, petitioner Grimes was sentenced to two years' imprisonment and petitioner Pearson received twelve months' probation.

1. The evidence showed that on April 11, 1966, two agents of the Alcohol and Tobacco Tax Division, acting on "reliable information" (R. 121), found that untaxed whiskey covered with straw was stored in a ditch seventy-five to one hundred yards from the home of petitioner Grimes (R. 34, 126–131). The ditch was in a wooded location (R. 49), dense with underbrush (R. 55), and separated from Grimes' garden by a private road. The road made a "horseshoe" or "horse leg" turn (R. 34) and led to a garage one hundred and ten yards from the house (R. 48). Grimes owned this land (R. 17).

The agents commenced surveillance of the area, and later that day they saw petitioner Grimes remove

empty jugs from a car, place them in a wheelbarrow (R. 59, 121, 166–167), and drive to the spot where the whiskey was stored, where another vehicle was also parked (R. 29, 41). Petitioner Grimes remained behind the two cars (R. 169) and was not seen in possession of the whiskey (R. 189), but an agent was able to see him handling jugs between the two cars (R. 167). Petitioner Pearson then arrived and Grimes went to his house (R. 170). Pearson was seen placing two half-gallon jugs of whiskey (R. 170) into the car which Grimes had driven to the storage location (R. 31). She and Grimes were then arrested (R. 170, 194).

The liquor which had been discovered on the first inspection was still in place when the surveillance commenced (R. 157). After the arrests, it was observed that some of the whiskey had been removed and that untaxed whiskey was near the two cars (R. 159). The whiskey was then seized (R. 122, 149, 170–172).

2. In the district where petitioners were tried, current voter registration lists of the eighteen counties making up the district were used in order to obtain the names of potential jurors (R. 67, 70). From these lists an aleatory (R. 112) or random method of selection was used in order to determine which registrants would receive questionnaires designed to determine their qualifications as jurors. The questionnaires were utilized to create a pool of approximately 2400 apparently qualified jurors (R. 96). In one group of fifty-three jurors it was found that twenty-seven occupa-

tions were represented, from bank officer to laborer (R. 109).

The trial judge made inquiry of those potential jurors who were summoned, to ascertain their statutory qualifications. This resulted in the disclosures by some prospective jurors that they had only limited education or had histories of physical or emotional difficulties necessitating care or hospitalization for some weeks (Pet. 18–24). Because of such disclosures two veniremen were in fact excused by the trial judge (Pet. 21, 23).

ARGUMENT

1. Petitioners attack the seizure of the liquor following their arrest on the ground that the agents had time to obtain a warrant after they first observed the liquor in the ditch, and should have done so. The seizure, however, was made incident to the arrest of petitioners, and was, therefore, reasonable. *United States* v. *Rabinowitz,* 339 U.S. 56. There was no search, but merely the taking of articles readily apparent at the time of the arrest. *Ker* v. *California,* 374 U.S. 23, 36–37; *United States* v. *Barone,* 330 F. 2d 543 (C.A. 2), certiorari denied, 377 U.S. 1004.

Since the seizure was incident to arrest, the question of whether the ditch was in the "curtilage" of the house is relevant only with respect to whether the initial discovery of the liquor constituted a violation of the Fourth Amendment rights of petitioner Grimes. The district court, with the agreement of the court of appeals (Pet. 3), found as a fact that since the ditch was in the woods between the house

and the garage, beside a dirt road which led from the street to the garage (R. 25), the agents' activity took place beyond the curtilage. This conclusion is correct. A witness called by petitioners at trial testified that the dirt road, and a field road beyond it, were accessible to and used by the public (R. 203–205). The examination of the whiskey thus falls within the doctrine of *Hester* v. *United States,* 265 U.S. 57, that observations in the course of a simple trespass on open fields do not violate the Fourth Amendment.

2. Petitioners also contend that the list from which the array of jurors was chosen was at the same time both too restrictive and insufficiently discriminating. They argue that the exclusive use of a voter registration list as the source of jurors excluded a cognizable class—nonvoters—and that, in addition, the quality of some potential jurors whose names were obtained from the voter list was sub-standard (Pet. 24).

The use of voter registration lists as the source of names for prospective jurors is permissible. *Chance* v. *United States,* 322 F. 2d 201, 203 (C.A. 5) certiorari denied, 370 U.S. 823; *Gorin* v. *United States,* 313 F. 2d 641 (C.A. 1), certiorari denied, 374 U.S. 829; see *United States* v. *Greenberg,* 200 F. Supp. 382 (S.D. N.Y.). Indeed the statute recently enacted by Congress, Public Law 90–274, 82 Stat. 53, contemplates the use of voting lists as the primary source for names of prospective jurors, to be supplemented only when necessary to assure fairness. See 28 U.S.C. 1863(b)(2) as amended by that statute. Petitioners do not contend that the current voting lists are discriminatory as to

race, creed, or social or economic group. The use of voting lists does not amount to the unlawful exclusion of a "class" of nonvoters or impose the status of elector as an additional qualification for service. Non-electors, "united only in disinterest" (*United States* v. *Greenberg, supra* at p. 391), have never been thought to constitute a cognizable class. See cases cited *supra*. The voter registration lists were used in this case after the decision in *Rabinowitz* v. *United States,* 366 F. 2d 34 (C.A. 5), abolishing the former practice of using "key men" in selecting potential jurors, because such lists were considered to be the best available source of names constituting a cross-section of the community. That jury service is thereby limited to electors is an incidental result. It does not establish an additional qualification for jury service since no adult citizen is thereby barred from eligibility for service.

Petitioners advance the further argument that the jury list was compiled unlawfully because there was insufficient assurance that prospective jurors could read and write, as required by 28 U.S.C. 1861(2). While it is true that the clerk and commissioner did not personally interview each prospective juror (Pet. 17), there is no provision requiring personal interviews. The questionnaires that were sent did inquire about all the statutory requirements, including ability to read and write the English language. That procedure was clearly adequate. See *Chance* v. *United States, supra* at p. 206. The ultimate determination as to the qualification of particular jurors was then made

on the basis of additional questioning by the judge when the jurors were summoned for actual duty.[1]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1968.

[1] The fact that one grand juror completed only the third grade of schooling (Pet. 19, 24) is not necessarily disqualifying. See *States* v. *Dreher*, 166 La. 924, 118 So. 85, 94, certiorari denied, 278 U.S. 641.

U.S. GOVERNMENT PRINTING OFFICE: 1968